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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MAURO ALFONSO DELGADO,

Defendant and Appellant.

D074537

(Super. Ct. No. SCD273601)

APPEAL from a judgment of the Superior Court of San Diego County, Sharon B. Majors-Lewis, Judge. Affirmed and remanded with directions.

Anthony J. Dain, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

A consolidated information charged Mauro Alfonso Delgado with two counts of first degree burglary (Pen. Code, §§ 459, 460, subd. (a)),¹ four counts of second degree burglary (Pen. Code, § 459), seven counts of receiving stolen property (Pen. Code, § 496, subd. (a)), six counts of grand theft (Pen. Code, § 487, subd. (a)), two counts of resisting an officer (Pen. Code, § 148, subd. (a)(1)), and one count of possessing drug paraphernalia (Health & Saf. Code, § 11364). During closing argument, defense counsel did not challenge some of the charges.

The jury ultimately convicted Delgado of two counts of first degree burglary (counts 1 and 3), three counts of second degree burglary (counts 7, 10, and 13), four counts of grand theft of personal property (counts 2, 4, 8 and 11), four counts of receiving stolen property (counts 5, 6, 16, 19, two counts of resisting an officer (counts 20 and 21), and one count each of possessing drug paraphernalia (count 22) and petty theft of personal property (count 14). The court found true an on-bail enhancement (counts 1 and 2) and four prior conviction allegations. The trial court sentenced Delgado to an aggregate term of 27 years eight months in prison.

Delgado appeals, contending that the trial court abused its discretion and denied him his federal due process rights when it declined to sever the charges regarding a residential burglary and grand theft (counts 1 and 2) from the remaining counts. He also asserts insufficient evidence supports a separate residential burglary count because residents had no access to the portion of the premises that he burglarized (count 3). He

¹ Undesignated statutory references are to the Penal Code.

contends that his first degree burglary conviction on this count should be modified to a conviction for second degree burglary. We reject these contentions and affirm the judgment.

Finally, Delgado asks for a limited remand to allow the trial court to exercise its discretion under section 1385 to strike his section 667, subdivision (a)(1) consecutive five-year term pursuant to Senate Bill No. 1393. The Attorney General concedes that in light of Senate Bill No. 1393 we must remand this matter to the trial court to allow it to exercise its section 1385 discretion whether to strike Delgado's section 667, subdivision (a)(1) enhancement. We agree that remand is appropriate.

FACTUAL BACKGROUND²

Flight From Police and Possessing Drug Paraphernalia (Counts 21 and 22)

In June 2016,³ police went to Delgado's home to arrest him on an outstanding felony warrant. Delgado fled out the back door and officers gave chase. After Delgado's apprehension, a search uncovered a pipe used for smoking methamphetamine.

Coronado Retirement Village Burglary (Counts 3 and 4)

On July 22, a fenced storage room at the Coronado Retirement Village was burglarized. Tools and other items were stolen. The total value of the property taken was about \$2,800. The burglar tried to cover a surveillance camera with a box. Police,

² We summarize only those counts that the jury found Delgado guilty of committing.

³ Undesignated date references are to 2016.

however, were able to recover footage depicting Delgado committing the crime.

Delgado's fingerprints were also found on the box placed over the surveillance camera.

SASS Electric - Receiving Stolen Property (Count 5)

On September 23, an electrician for SASS Electric arrived for work at a construction site in Pacific Beach. Electrical materials worth around \$50,000 had been stolen. Some of the missing materials were later found during a search of Delgado's home.

Orion Construction - Receiving Stolen Property (Count 6)

On October 10, a worker at a construction site located in Point Loma discovered that the lock on a trailer had been cut. Between \$10,000 and \$20,000 worth of construction equipment was missing. Some of the equipment was found during a search of Delgado's home.

International Design Burglary and Grand Theft (Counts 7 and 8)

On October 22, the owner of International Design arrived at an apartment construction site on 31st Street in San Diego. He saw that a door had been compromised and handles from storage spaces were missing. Tools and materials had been stolen. The total value of the missing property was between \$5,000 and \$6,000. Surveillance footage showed that at around 1:40 a.m., Delgado destroyed one of the cameras.

Byron Street Burglary and Grand Theft - (Counts 10 and 11)

On November 4, Emmanuel B., who lived next door to a condominium construction project, was awakened by a rummaging sound coming from the construction site. When he looked out his bedroom window he saw two men, one later identified as

Delgado, rummaging through a trash can. The men left after Emmanuel threatened to call the police. A half an hour later, Emmanuel looked out his bedroom window after hearing noise. Emmanuel saw Delgado's companion dragging a trash can down the driveway. Emmanuel chased the man away. When a worker arrived at the construction site later that morning he discovered that the lock on a storage bin had been cut and all of the tools had been stolen. Materials valued at about \$5,000 were missing.

Byron Street Burglary II - Receiving Stolen Property (Count 19)

On November 14, the Byron Street site was broken into a second time. Tools valued between \$10,000 and \$12,000 had been stolen. Police later found some of the stolen property during a search of Delgado's home.

Mariner's Cove Burglary and Petty Theft (Counts 13 and 14)

Delgado's mother was a long-time resident of Mariner's Cove, an apartment complex in Point Loma. The complex had small buildings used to store materials. On November 14, the service manager discovered the latch on one of the shops was broken and a piece of plywood had been pulled back. Materials valued between \$500 and \$600 were missing. Police later found some of the stolen items during a search of Delgado's home.

Pacific Enterprise Builders - Receiving Stolen Property (Count 16)

On November 14, the manager for Pacific Enterprise Builders went to a construction site in Point Loma. He discovered that two windows and some power tools were missing from the garage. Police later found the two windows during a search of Delgado's home.

Flight From Police - (Count 20)

On November 15, police conducted a sting operation on the seller of stolen property that had been listed on a website. Delgado, the seller, ran away when he saw the police.

Tourmaline Street Burglary and Grand Theft - (Counts 1 and 2)

On March 20, 2017, Peter A. lived in a home on Tourmaline Street in Pacific Beach and was in the process of building a home addition. The home was surrounded by a wooden fence on the sides and a rented fence on the front and back. When he looked inside a container that morning, he discovered that all of his tools were missing. Together, the tools were worth around \$26,000. Peter noted that someone had taken black pipe cement from the container and rags from the laundry area, and covered all the motion sensor lights in the front and back of the house. Inside the construction area Peter found a knit cap.

Peter reported the theft, and gave police the cap. DNA analysis on the inside of the cap showed it contained a mixture from three individuals: 64 percent from one, 35 percent from the second, and one percent from the third. Delgado was the 64 percent contributor.

DISCUSSION

I. *SEVERANCE*

A. *Additional Background*

Before trial, defense counsel moved to sever counts 1 and 2 (the Tourmaline Street burglary and grand theft) from the remaining charges. The People moved to consolidate

all counts. After hearing argument on the competing motions, the trial court noted that the counts were similar theft-related crimes related to stealing construction tools. It found that judicial economy would be served consolidating all counts and that the jury would be instructed to consider all crimes separately. Nonetheless, the court delayed ruling on the motions to read the cases cited by the parties.

After reading the cited cases, the court tentatively ruled that all counts should be consolidated, finding that consolidation would not be prejudicial. The court heard further argument and concluded that all counts should be tried together.

B. Legal Principles

"[C]onsolidation or joinder of charged offenses 'is the course of action preferred by the law.' " (*People v. Soper* (2009) 45 Cal.4th 759, 772 (*Soper*).) When separate accusatory pleadings assert offenses that are "connected together in their commission [or are] of the same class of crimes or offenses, . . . the court may order them to be consolidated." (§ 954.) The purpose of section 954 is to avoid the " 'increased expenditure of funds and judicial resources which may result if the charges were to be tried in two or more separate trials.' " (*Soper*, at p. 772.) The term "same class of crimes or offenses" in section 954 refers to offenses that possess common characteristics or attributes, and courts have interpreted the term broadly. (See *People v. Grant* (2003) 113 Cal.App.4th 579, 586 [counts of burglary, concealing stolen property, and possession of property with a removed serial number were properly joined as crimes against property.]

" 'When . . . the statutory requirements for joinder are met, a defendant must make a clear showing of prejudice to establish that the trial court abused its discretion in

denying the defendant's severance motion. [Citations.] In determining whether there was an abuse of discretion, we examine the record before the trial court at the time of its ruling. [Citation.] The factors to be considered are these: (1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case.' [Citation.] 'Even if a trial court's severance or joinder ruling is correct at the time it was made, a reviewing court must reverse the judgment if the "defendant shows that joinder actually resulted in 'gross unfairness' amounting to a denial of due process." ' " (*People v. Pettie* (2017) 16 Cal.App.5th 23, 42.) A "determination of prejudice is a highly individualized exercise, necessarily dependent upon the particular circumstances of each individual case." (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 452, superseded in part by statute as stated in *People v. Jones* (2013) 57 Cal.4th 899, 927.)

C. Analysis

Delgado contends that the trial court erred in trying counts 1 and 2 (the Tourmaline Street burglary and grand theft) with the other charges because the evidence connecting him with these crimes, a cap containing some of his DNA, was much weaker than the other crimes. He notes that there were no eyewitnesses to this burglary that identified him as a participant, no incriminating videotape evidence, stolen property from

this burglary was not found in his possession, and he did not confess to committing this burglary.

As Delgado concedes, the statutory requirements for joinder of the charges were satisfied because all of the charges were of the same class of crimes for purposes of section 954. Since the requirements for joinder were satisfied, Delgado can predicate error only on a clear showing of potential prejudice. (*People v. Kraft* (2000) 23 Cal.4th 978, 1030 (*Kraft*).) To determine whether joinder of the theft charges prejudiced Delgado, we first examine whether evidence on each set of charges would have been admissible in a separate trial on the other. (*Ibid.*) If so, this dispels any inference of prejudice. (*Ibid.*)

Delgado argues, and the Attorney General agrees, that there was no cross-admissibility of evidence. We concur that there was no cross-admissibility of evidence. Nonetheless, "the absence of cross-admissibility does not, by itself, demonstrate prejudice." (*Kraft, supra*, 23 Cal.4th at p. 1030; see also *People v. Johnson* (2015) 61 Cal.4th 734, 751 ["absence of cross-admissibility cannot alone establish the substantial prejudice necessary to make severance mandatory"].)

In this situation, "we proceed to consider 'whether the benefits of joinder were sufficiently substantial to outweigh the possible "spill-over" effect of the "other-crimes" evidence on the jury in its consideration of the evidence of defendant's guilt of each set of offenses.' " (*Soper, supra*, 45 Cal.4th at p. 775.) In a noncapital case like this one, that requires an assessment of "(1) whether some of the charges are particularly likely to inflame the jury against the defendant[, and] (2) whether a weak case has been joined

with a strong case or another weak case so that the totality of the evidence may alter the outcome as to some or all of the charges" (*Ibid.*) To meet his burden of showing a substantial danger of prejudice, Delgado must show that the ruling fell outside the bounds of reason. (*Id.* at p. 774.)

Delgado concedes that the facts of the charges were not particularly inflammatory, but asserts that the sheer number of other burglary and theft-related crimes he indisputably committed prejudiced him as to counts 1 and 2. Citing *Coleman v. Superior Court* (1981) 116 Cal.App.3d 129 (*Coleman*), he claims that if a juror had a reasonable doubt about the identity of the burglar in counts 1 and 2, "the juror may find it difficult to maintain that doubt in the face of direct evidence concerning the numerous other burglary and theft offenses" he committed.

In *Coleman, supra*, 116 Cal.App.3d 129, the reviewing court found an abuse of discretion in failure to sever charges of rape, sodomy, and murder of an adult from two counts of rape and one count of oral copulation with respect to a 13-year-old victim, and one count of committing a lewd act on an 11-year-old victim. (*Id.* at pp. 133-134, 139-140.) There, the crimes the defendant sought to sever, sex crimes against minors, were "likely to inflame [the] jury" (*id.* at p. 138), a factor not present in this case. Additionally, the *Coleman* court noted: "We do not purport to lay down any rule as to when a denial of a motion for severance constitutes an abuse of discretion. In the nature of things, such a determination can only be made on a case by case basis turning on the particular facts of the cases." (*Id.* at p. 139.)

Delgado notes that count 1 was the most serious charge (first degree burglary with the inhabitant present). He claims that count 1 and count 2 (the grand theft connected to the count 1 burglary) were also the weakest counts because there were no eyewitnesses, no videotape evidence, none of the stolen property from this burglary was found in his possession, and he did not confess to this burglary.

It is "always . . . possible to point to individual aspects of one case and argue that one is stronger than the other. A mere imbalance in the evidence, however, will not indicate a risk of prejudicial 'spillover effect,' militating against the benefits of joinder and warranting severance of properly joined charges." (*Soper, supra*, 45 Cal.4th at p. 781.) Moreover, severance is not required "because properly joined charges might make it more difficult for a defendant to avoid conviction compared with his or her chances were the charges to be separately tried." (*Ibid.*) To demonstrate the potential for a prejudicial spill-over effect, defendant must show an "extreme disparity" in the strength or inflammatory character of the evidence. (*Belton v. Superior Court* (1993) 19 Cal.App.4th 1279, 1284.)

Here, while the evidence connecting Delgado to counts 1 and 2 was of a different character than the evidence connecting him to the other charged burglaries, we cannot describe it as "weak." Inside his fenced yard the homeowner found a cap with a mixture of DNA from three individuals, with Delgado providing 64 percent of the DNA. The homeowner's testimony established that the cap had been left between when the homeowner went to sleep (1:00–1:30 a.m.) and when he awakened (7:00 a.m.). Additionally, when Delgado spoke to a detective about the Coronado crime where he had

covered a surveillance camera with a box, he gave a detail about the Tourmaline burglary; namely, that the cameras had been covered "with a rag, or a piece of paper, or something." The prosecutor noted this corroborating evidence during closing argument when he reminded the jury that they could not convict Delgado based solely on the presence of DNA on a moveable object left at the scene.

Finally, Delgado contends that joinder of counts 1 and 2 was counterproductive to judicial economy because many of the counts were undisputed and severance of counts 1 and 2 would have likely resulted in a guilty plea to the remaining charges. The People counter that nothing prevented Delgado from pleading guilty to the uncontested charges. These speculative scenarios play no part in our analysis because our review of the order is confined to the record before the trial court when it ruled on the motion. (*People v. Price* (1991) 1 Cal.4th 324, 388.) At that time, Delgado faced numerous theft related charges. Delgado has not cited, and we have not found anything in the record suggesting a possible plea agreement on *any* of the charges before the court denied severance. Based on the record before it, consolidation was the only course of action that furthered judicial economy, and Delgado has failed to show that the court's ruling fell outside the bounds of reason.

Delgado alternatively argues that, assuming the trial court properly joined counts 1 and 2, reversal is required because the joinder violated his federal constitutional rights. He contends that the jury likely convicted him of counts 1 and 2 based on its presentation with the other theft crimes.

Even where, as here, we conclude that the trial court acted within its discretion in consolidating charges, "we must further inquire whether events *after* the court's ruling demonstrate that joinder actually resulted in 'gross unfairness' amounting to a denial of defendant's constitutional right to fair trial or due process of law." (*People v. Merriman* (2014) 60 Cal.4th 1, 46 (*Merriman*).) In an attempt to show that events *following* the trial court's ruling made it likely that the consolidation of the charges influenced the jury, Delgado argues that during closing argument the prosecutor expressly relied on the other crimes evidence in arguing counts 1 and 2 even though the trial court previously ruled the other crimes evidence not admissible as proof of identity or modus operandi under Evidence Code section 1101, subdivision (b).

During rebuttal, after arguing counts 1 and 2, the prosecutor stated, "There's nothing unique about stealing tools, in theory, right? But there is something unique about the tools that Mr. Delgado is taking." The prosecutor then referenced the other burglaries and suggested that Delgado likes to steal the same brand and type of tools. The prosecutor then urged the jury to "put the pieces together," "connect the dots on everything that happened during this case," and find Delgado guilty on all counts. Although defense counsel did not object to this argument, it comes close to violating the court's prior ruling to not consider other crimes evidence. Defense counsel, however, previously argued that the evidence was not cross-admissible:

"Now, it comes as no surprise to you that there are multiple counts in this case. And the law requires that you consider each of those counts individually. You don't get to say that because Mr. Delgado had property from Orion Construction that therefore he committed the burglary at Mariner's Cove. That is impermissible under the law. It is not allowed.

You cannot decide that this is just what Mr. Delgado does, and, therefore, he must be guilty of everything that has been charged. That is impermissible under the law. It is not allowed. [¶] You must take a look at each and every one of these counts—and I have highlighted for you the ones that I think are most important for you to take a look at—and decide what evidence it was that the People presented, not simply how much property was recovered from Mr. Delgado's house."

The court also instructed the jury that each count must be separately decided (CALCRIM No. 3515) and that the prosecution had the burden of proving each charge beyond a reasonable doubt (CALCRIM No. 220). The individual instructions for each of the theft related crimes also reminded the jury that the prosecution had the burden of proving all elements of each crime. (CALCRIM Nos. 1700, 1750, 1800.) Nothing in the record indicates the jury failed to follow these instructions. (*Merriman, supra*, 60 Cal.4th at pp. 48-49 [absent contrary showing, jury presumed to follow instructions to consider each count separately].) Notably, the jury found Delgado not guilty of one of the burglary counts and its related grand theft count. Thus, the record reflects that the jury was able to compartmentalize the evidence and consider each count separately. The prosecutor's brief remark during rebuttal argument, that was not objected to at trial, when viewed in light of the entire record, did not result in gross unfairness. Accordingly, we conclude that Delgado has failed to show that denial of severance deprived him of a fair trial. (*People v. Sandoval* (1992) 4 Cal.4th 155, 174 [The defendant " 'asserting prejudice has the burden of proving it; a bald assertion of prejudice is not sufficient.' "].)

II. SUFFICIENCY OF EVIDENCE

A. Additional Facts

The Coronado Retirement Village is a two-story building with 100 bedrooms, a laundry room, two dining rooms and a memory care department. The building houses between 90 to 95 elderly residents. The side parking area of the building has an enclosed office and storage area for maintenance equipment and supplies. The storage area is under a building overhang, is divided into three garages, and secured in the front with a chain-link fence containing a locked gate. Only two people have a key to the gate lock. None of the building residents had access to this storage area, nor were any of their belongings stored there.

After the People rested, defense counsel moved for a judgment of acquittal arguing that the evidence showed this burglary did not occur in a residential area and thus it did not qualify as first degree burglary. (§ 1118.1.) The trial court disagreed, finding "it's enough evidence for the jury to decide." Both counsel argued to the jury whether this crime qualified as a residential or commercial burglary. The trial court also instructed with CALCRIM No. 1701, as follows:

"Burglary is divided into two degrees. If you conclude that the defendant committed a burglary, you must then decide the degree.

"First degree burglary is the burglary of an inhabited house or a room within an inhabited house or part of a building.

"A house or part of a building is *inhabited* if someone uses it as a dwelling, whether or not someone is inside at the time of the alleged entry.

"A *house* includes any structure or garage that is attached to the house and functionally connected with it.

"All other burglaries are second degree.

"The People have the burden of proving beyond a reasonable doubt that the burglary was first degree burglary. If the People have not met this burden, you must find the defendant not guilty of first degree burglary."

B. *Analysis*

Delgado does not dispute that he burglarized the Coronado Retirement Village (count 3), rather he appeals the degree of his conviction, and asks us to reverse his first degree burglary conviction and reduce the burglary to second degree. He contends that, because he entered an uninhabited, commercial part of the building in which the residents had no possessory interest or right of access, the evidence supports only a second degree burglary conviction. We disagree.

"When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." "We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence." (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) Reversal is not warranted "unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Burglary is the entry of "any house . . . or other building . . . with intent to commit grand or petit larceny or any felony." (§ 459.) "Every burglary of an inhabited dwelling house . . . is burglary of the first degree. [¶] (b) All other kinds of burglary are of the

second degree." (§ 460, subds. (a), (b).) The term " 'inhabited' " is defined as "currently being used for dwelling purposes, whether occupied or not." (§ 459.) The terms " 'residence' " and " 'inhabited dwelling house' " have been interpreted to have equivalent meanings. (*People v. Rodriguez* (2000) 77 Cal.App.4th 1101, 1107 (*Rodriguez*).) To effect the legislative purpose of the burglary statute, namely, "to protect the peaceful occupation of one's residence" against intrusion and violence, the phrase " 'inhabited dwelling house' " has been broadly construed. (*People v. Cruz* (1996) 13 Cal.4th 764, 775, 776 (*Cruz*).)

A burglary is " 'an entry which invades a possessory interest in a building.' " (*People v. Yarbrough* (2012) 54 Cal.4th 889, 892; *People v. Gauze* (1975) 15 Cal.3d 709, 714 (*Gauze*) [same].) Accordingly, the defendant in *Gauze* could not be guilty of burglarizing his own home because "[h]is entry into the apartment, even for a felonious purpose, invaded no possessory right of habitation" (*Ibid.*)⁴ Stated differently, a possessory interest in a place is a circumstance used to determine whether the place was

⁴ Delgado cites a number of cases for the proposition that burglary is a crime against possessory rights. Although not incorrect, this contention is incomplete. These cases all work to explain the principle articulated in *Gauze*, *supra*, 15 Cal.3d at page 714, that an entry must invade a possessory right in a *particular place* to constitute a burglary. (*People v. Trevino* (2016) 1 Cal.App.5th 120, 122 [" 'inhabited dwelling house,' as used in [section 460, subdivision (a)], includes an inhabited RV"]; *Cruz*, *supra*, 13 Cal.4th at p. 779 [inhabited dwelling house includes an inhabited vessel]; *People v. Wilson* (1992) 11 Cal.App.4th 1483, 1489 [inhabited dwelling house includes a tent]; *People v. Salemm* (1992) 2 Cal.App.4th 775, 781 ["[A] person who enters a structure enumerated in section 459 with the intent to commit a felony is guilty of burglary *except* when he or she (1) has an unconditional possessory right to enter as the occupant of that structure or (2) is invited in by the occupant who knows of and endorses the felonious intent."]; *People v. Fleetwood* (1985) 171 Cal.App.3d 982, 985 [hotel room constituted a dwelling house].)

an inhabited dwelling. (*People v. Cardona* (1983) 142 Cal.App.3d 481, 484 [In determining whether a home is inhabited, the "dispositive element is whether the person with the possessory right to the house views the house as his dwelling."].) Here, ample evidence supports the jury's conclusion that the Coronado Retirement Village constituted an inhabited dwelling. Namely, at the time of the burglary, the Coronado Retirement Village building housed 90 elderly residents who resided in what the administrator for the Coronado Retirement Village described as apartments. Delgado has not cited, and we have not located, anything in the record suggesting that the residents of the Coronado Retirement Village are not allowed to come and go as they please, including taking late night strolls around the building. The physical separation of the location burglarized from residents' sleeping quarters does not diminish the potential danger of a violent confrontation. (*People v. Hines* (1989) 210 Cal.App.3d 945, 951 ["A burglar is no more welcome in an outlying cookhouse than he or she is in a bedroom."], disapproved on other grounds by *People v. Allen* (1999) 21 Cal.4th 846, 864.)⁵

The next question is whether the storage area that Delgado entered is considered part of the inhabited dwelling. Garages of apartment buildings and duplexes have been held to be part of inhabited dwelling houses. (*People v. Zelaya* (1987) 194 Cal.App.3d

⁵ Delgado's citation to *People v. Colbert* (2019) 6 Cal.5th 596 does not further his argument as it stands for the established principle that a burglary "occurs when a defendant with the requisite intent enters a structure where he or she has no right to be, and a person has no right to be in a structure—or in a room within the structure [citation]—without the effective consent of the owner or occupant." (*Id.* at p. 606.) Accordingly, the *Colbert* court concluded that "entering an interior room that is objectively identifiable as off-limits to the public with intent to steal therefrom is not punishable as shoplifting under section 459.5, but instead remains punishable as burglary." (*Id.* at p. 608.)

73, 75 [apartment building garage and storage rooms located beneath residential units]; *In re Edwardo V.* (1999) 70 Cal.App.4th 591, 593-595 [garage of duplex].) Laundry rooms in apartment complexes and partially open carports have been deemed part of inhabited dwelling houses. (*People v. Woods* (1998) 65 Cal.App.4th 345, 347, 348-350 [common laundry facility in an apartment complex]; *In re Christopher J.* (1980) 102 Cal.App.3d 76, 77, 78-79 [square roofed carport with two sides open to the weather].) To determine "whether a structure is part of an inhabited dwelling, the essential inquiry is whether the structure is 'functionally interconnected with and immediately contiguous to other portions of the house.' [Citation.] 'Functionally interconnected' means used in related or complementary ways. 'Contiguous' means adjacent, adjoining, nearby or close." (*Rodriguez, supra*, 77 Cal.App.4th at p. 1107; see CALCRIM No. 1701.)

Here, the storage area that Delgado burglarized was located under the same roof as the Coronado Retirement Village and was used to store tools and materials for maintenance of the building. It had walls on three sides and a chain-link fence in the front with a locked gate. These facts amply supports the jury's conclusion that the storage area was functionally connected to the inhabited dwelling.

Finally, we reject Delgado's suggestion that he did not commit first degree burglary because the storage area that he entered did not constitute an *inhabited* portion of the building. "It is well settled that burglary of an inhabited dwelling house may be accomplished even if the specific room that the burglar unlawfully enters is not a space where people live. In determining whether the defendant has burglarized an inhabited dwelling house, '[t]he question is not whether the specific area is used for sleeping or

everyday living, but whether the area is functionally interconnected to and immediately contiguous to the residence, which is used for sleeping or everyday living.' " (*In re M.A.* (2012) 209 Cal.App.4th 317, 323.) Additionally, an area such as an attached garage, even if it lacks direct access to the residence, falls within the policies informing the law of first degree burglary. (*People v. Moreno* (1984) 158 Cal.App.3d 109, 112.) Regardless of the residents' lack of personal use of the storage area, existing case law supports the jury's finding that the storage area was functionally-interconnected to the inhabited dwelling.

Accordingly, we conclude that sufficient evidence supports the jury's finding of first degree burglary of an inhabited dwelling house.

III. *PRIOR SERIOUS FELONY CONVICTION ENHANCEMENT*

The trial court imposed a five-year prison term enhancement under section 667, subdivision (a) based on the court's finding that Delgado had a prior serious felony conviction. (§ 667, subd. (a).) At the time of Delgado's sentencing, trial courts had no authority to strike or dismiss enhancements proven under section 667, subdivision (a)(1). (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).) On September 30, 2018, the Governor signed Senate Bill No. 1393, which, effective January 1, 2019, amended section 1385, subdivision (b) to allow a court to exercise its discretion whether to strike or dismiss a prior serious felony conviction for sentencing purposes. (*Ibid.*)

The parties agree that this new law applies retroactively to Delgado and that the matter should be remanded to give the trial court an opportunity to exercise its discretion pursuant to recently amended sections 667, subdivision (a)(1) and 1385, subdivision (b).

Because we cannot conclusively determine from the record that remand would be a futile act, we remand for the trial court to consider whether to dismiss or strike the five-year section 667, subdivision (a) enhancement imposed on Delgado. (See *Garcia, supra*, 28 Cal.App.5th at p. 973, fn. 3 [Remanding for resentencing when "[t]he record does not indicate that the court would not have dismissed or stricken defendant's prior serious felony conviction for sentencing purposes, had the court had the discretion to do so at the time it originally sentenced defendant."].) We express no opinion about how the court should exercise its discretion.

DISPOSITION

The matter is remanded with directions to the trial court to decide whether it will exercise its newfound discretion to strike the prior serious felony conviction enhancement under sections 667, subdivision (a) and 1385, subdivision (b). If the court decides to strike the enhancement, forward a corrected copy of the abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NARES, Acting P. J.

WE CONCUR:

HALLER, J.

IRION, J.